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SUMMARY RECORD OF THE 451st MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 18 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 9.40 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS
(continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 6 (continued)

1. The CHAIRMAN recalled that, in the course of the discussion of article 6 at the previous meeting, there had been a clear majority in favour of the concept of "deemed acceptance". That had been the decision reached, although alternative paths favoured by some delegations had been examined. It had become clear that the concerns of all could be accommodated and the desired goal achieved by adjustments to the timing contained in the existing rules.
2. Mr. GREGORY (United Kingdom) said there was no doubt that the main concern was one of timing. He agreed with the suggestion by the United States representative that a possible solution was the provision of an extra day for notice of rejection. Consequently, on behalf of his own delegation and of the delegations of Canada and the United States of America, he proposed the insertion of the words "the business day following" in the last sentence of article 6(3) before the words "the execution date". A consequential change to article 6(2)(a) was then needed, the words "execution under article 10" being replaced by "giving notice of rejection under paragraph (3) below".
3. Thus, if the bank accepted a payment order, it would do so under subparagraphs (b), (c) and (d). If it did not act, the first question would be whether subparagraph (a) applied, with due regard for paragraph 3 and whether payment had been received.
4. Where an extra day was already allowed under article 5 in respect of certain means of payment, the times allowed in articles 5 and 6 would run concurrently, there being no question of adding any other additional days to the time period.
5. Mr. POTYKA (Observer for Austria) said he supported the proposal to add an additional day in article 6(3). However, as the representative of Germany had indicated, the issue should also be considered in connection with article 10. If an extra day were allowed for the rejection of a payment order, a bank might have the duty under article 10 to execute a payment order that it had not yet accepted. The problem could be solved by allowing an additional day for execution under article 10.
6. The CHAIRMAN suggested that discussion of the effect of the proposal on article 10 should be postponed until the proposal had or had not been accepted.
7. Mr. VASSEUR (Banking Federation of the European Community) said that he wished to draw the Commission's attention to the interrelationship between the Model Law and national legislation dealing with money-laundering in relation to organized crime. Many countries had laws which required banks to report suspected instances of money-laundering. In such a case, they were required

(Mr. Vasseur, Banking Federation of the European Community)

to suspend execution of the credit transfer or payment order. If so ordered by a court, the suspension might be for an extended period. The preferred procedure, however, was that the bank concerned should not reject the payment order but execute it, if all was in order, after a period of, perhaps, several days.

8. That procedure would give rise to a conflict with the Model Law, which provided for acceptance or "deemed acceptance" within a fixed time-limit. European banks were concerned that the text should be made more flexible, so that such a conflict could be avoided.

9. The CHAIRMAN said that questions such as money-laundering or foreign exchange controls were outside the scope of private law. Consequently, it had been decided that they should be excluded from the Model Law.

10. Mr. HERZBERG (Observer for Israel) said he agreed with the proposal put forward by the representative of the United Kingdom. He suggested, however, that the Drafting Group should address the question of defining "day" or "business day" in connection with time-limits. If "day" meant "business day", there was a definition in article 10(4), but the formulations varied from article to article.

11. Ms. KOSKELO (Observer for Finland) said that, if the proposal to add an extra day for acceptance in article 6(3) were adopted, it would still be necessary to provide a time of execution in the case of "deemed acceptance". For example, if a payment order were received on day one, and there were funds available in the account, the proposed article 6(3) would give rise to "deemed acceptance" on day two. It was therefore clear, as the observer for Austria had said, that a new rule was needed in article 10 to provide yet another day for execution, i.e. execution would take place on day three.

12. Mr. ERIKSSON (Observer for Sweden) said the proposal by the representative of the United Kingdom would usefully resolve the problems discussed in the previous meeting. He would be able to accept it provided that a further change in article 6(3) were made, as proposed in his Government's written comments (A/CN.9/347, p. 45) that notice of rejection should be given at the earliest possible time, since that was in the sender's interests.

13. Mr. KAKOLECKI (Observer for Poland) said that the proposed extra day would allow for the case when a payment order was received late in the day. He also supported the Swedish proposal, which would encourage notification of rejection on the same day where that was possible.

14. As for the question of money-laundering, it might, perhaps, be considered in the context of the final provisions.

15. The CHAIRMAN said that, unless there was strong support among the members of the Commission for dealing with the issue of money-laundering in the final provisions, he would assume that the Commission's basic approach remained unchanged.

16. Mr. CRAWFORD (Canada), replying to the observer for Finland, said that the proposal introduced by the representative of the United Kingdom did not entail the addition of yet another day. The key to understanding the proposal was that acceptance occurred only because it was "deemed" so to do. The duty to execute arose under article 7. If there was a failure to execute or to reject within the prescribed time-limit, then execution would be late, and a liability for value or interest would be incurred as provided for in article 16.
17. Mr. SCHNEIDER (Germany) said he had a purely editorial change to propose. Since subparagraphs (b), (c) and (d) of paragraph 2 related to the normal process of acceptance by conscious act, he proposed that they should be renumbered (a), (b) and (c). The exceptional case, "deemed acceptance", would then become subparagraph (d).
18. He agreed with the observer for Finland that it was necessary to consider the relationship between articles 6 and 10. Only one extra day was needed so that, if it were provided in article 10, there was no need for it in article 6. If two extra days were provided under article 10 and a further day under article 6, then banks would be able to wait up to three days before rejecting the payment order without any interest becoming payable; that would be very nice for the banks.
19. There was no need to deal with the question of money-laundering in the context of the Model Law. The Model Law had, of course, to be consistent with criminal and supervisory law, but that would be accommodated by appropriate interpretation and the rules for the subjection of contract law to other law.
20. Mr. HUANG Yangxin (China) said he agreed with the proposal by the representative of the United Kingdom. He also thought that the Drafting Group should consider the matter of time of acceptance, execution and rejection in relation to the Model Law as a whole.
21. It would be useful if the question of money-laundering were mentioned at the end of the Model Law.
22. U NYI NYI THAN (Observer for Myanmar) said that money-laundering was a serious factor in drug-trafficking, a problem that his Government had been combating since 1948. He agreed with the representative of China and the observers for Poland and the Banking Federation of the European Community that it should be covered in the Model Law.
23. Mr. HERZBERG (Observer for Israel) said that, while he recognized the importance of money-laundering in drug-trafficking, he thought it was a matter for national legislation and not for the Model Law.
24. The CHAIRMAN said that it was a problem to be dealt with by the proper organizations. If there were any further comments on the matter, he would ask the members of the Commission for an indicative vote.

25. Ms. KOSKELO (Observer for Finland) said that, despite the assurances given by the representative of Canada, she was still concerned about the effect on article 10 of the proposal concerning article 6(3). As she understood it, if a payment order was received and funds were available on day one, the proposal would mean that the order would be deemed to have been executed at the end of day two and, according to article 10, interest would be payable as from and including day two. It was unclear what would happen if execution actually took place on day three. The proposal did not seem to provide for an interest-free extra day.

26. Mr. NEWMAN (United States of America) said that the issue under consideration was not the receipt or payment of interest by banks, but the value date - or execution or payment date - of a payment order. The reason for proposing an extra day in article 6 was to provide for the case of payment orders that were received late in the day when the payment systems had closed down. In such a case, time was needed for investigation, which might not be completed until the following day. If an order were rejected on the day following the receipt of the credit, the bank concerned would claim one day's interest. There was no question of trying to eliminate interest: what was sought was execution on the value date and the ability, if a problem arose, to reject a payment order on the following day.

27. Mr. LIM (Singapore) said that the observer for Finland had raised a real problem of concept and drafting. Under article 6(2) and (3) as they stood before the proposed amendment, the time of execution was linked with the timing under article 10 but, if article 6 were amended to include the words "business day following" the execution date, with the consequential change in subparagraph (a), there would be a discrepancy between the two articles. Article 10 provided that the bank was required to execute the payment order on the day it was received whereas, under the amended article 6, the bank would not be required to reject an order until the day after receipt.

28. The CHAIRMAN said that the question of the interest payable, raised by the observer for Finland, could be dealt with under article 16.

29. Mr. GREGORY (United Kingdom) said that it was implicit from the structure of the Model Law and the order in which the articles appeared that execution did not have to take place until after acceptance. If that was not clearly understood, it should be made explicit.

30. In one of the examples given by the observer for Finland, where payment for an order was received on day one but the bank did nothing, no notice of rejection being given, the result was that the order was deemed to have been accepted at the end of day two and the bank was then required, under article 7, to execute the order in the time given under article 10. If article 10 had no retrospective effect but applied only from the moment of acceptance, it would be at that moment - on day two - that the bank was required to execute the order. Interest would not normally be payable from the day the payment was received but only from the day that the bank was required to execute the payment order.

(Mr. Gregory, United Kingdom)

31. As for the suggestion that a bank might gain financially by holding payment orders and then rejecting them at the end of the specified period, it was his own opinion that, if a credit transfer were not completed and the "money-back" guarantee operated, interest would have to be paid from the day the payment was received. In other words, a bank which had received a payment order with cover and then rejected it in the time allowed would have to return the money with interest, if it had held it for the two days allowed.

32. Mr. POTYKA (Observer for Austria) said that it would be a waste of time to become involved in a complicated exercise to redraft article 10(1) in order to provide an extra day, when article 6(3) provided that notice of rejection must be given not later than on the execution date. All that was needed was to provide, under article 10, for one more day for execution or rejection. That would avoid such anomalies as providing that an order could be rejected after the execution date or the date on which it was deemed to have been accepted. Acceptance should not be mingled with execution.

33. The CHAIRMAN said it seemed to be the prevailing view in the Commission that an additional day should be provided for the purposes of articles 6 and 10 and that situations in which a receiving bank would have two additional days should, if possible, be avoided. If that approach was acceptable, a small ad hoc drafting group might be set up to prepare a text.

34. Ms. KOSKELO (Observer for Finland) drew attention to the provisions concerning cut-off time in article 10(4), which should be taken into account in discussions on the need for an additional day.

35. Mr. BHALA (United States of America) said that, while he would be happy to serve in an ad hoc drafting group, it might be possible to solve the problem without one. The Commission was dealing with a very narrow problem, arising only in the event of deemed acceptance. Since execution could not take place before acceptance, there was no need for concern about execution until day two. If execution did not take place until day three, it would be with a value date of day two.

36. Mr. ADEDIRAN (Nigeria) proposed that article 6(3) should remain as it stood but that article 10(1) should be amended by the insertion of the words "but not later than the day of acceptance" before the word "unless" in the second line.

37. With regard to drug-trafficking, the conflict between the application of the Model Law and that of the national narcotics laws merited examination.

38. The CHAIRMAN said that, while the Commission attached great importance to the problem of money-laundering and drug-trafficking, it was not competent to deal with such problems, which should be left to the appropriate bodies. Having noted from a show of hands that more than two thirds of the members of the Commission agreed with that approach, he said that, if he heard no objection, he would take it that the Commission did not wish to include any rules on the subject in the Model Law.

39. It was so decided.

40. Mr. GREGORY (United Kingdom) said that his delegation was still in favour of the principle of "same-day" execution and did not, for the moment, wish to commit itself to making any adjustment to article 10 to provide an extra day. The problem the Commission had been discussing related only to the narrow issue of deemed acceptance.

41. The CHAIRMAN said that there seemed to be a general feeling that one more day might be required for execution purposes, and a number of suggestions had been made to that effect. He would prefer, however, that the appointment of an ad hoc drafting group be postponed until the debate on article 10(1) had been completed.

42. In any case, he took it that the Commission agreed, in principle, that an extra day should be provided for deemed acceptance.

43. It was so decided.

44. The CHAIRMAN invited comments on the German proposal that the order of the subparagraphs in article 6(2) be changed, subparagraphs (b), (c) and (d) being renumbered (a), (b), and (c) and subparagraph (a) becoming subparagraph (d).

45. Mr. GRIFFITH (Observer for Australia) and Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said they supported the proposal.

46. The German proposal was adopted.

Article 10

47. Mr. SCHNEIDER (Germany) said that there were tremendous differences between the various payment systems in the world. Advanced electronic systems were used in the United States but many transfer systems in Europe were paper-based. Furthermore, many transactions in Europe were carried out not by cheque but by credit transfer. The result was that many millions of payment orders reached the European banks every day and, if the Model Law were adopted for domestic as well as international transfers, the position of small and medium banks - which would be incapable of executing all the payment orders on the day they were received - should be taken into account.

48. If, as he feared it might, the Commission accepted the "money-back" guarantee, the appropriate routing would need to be known so that the risks involved in executing a payment order could be assessed, and such inquiries took time.

49. He pointed out that, while the Commission was dealing with the problem of harmonizing international law, some parallel efforts were being made to harmonize regional law. The European Community had quite recently adopted a recommendation dealing with the question of the execution date and it had included a rule providing an extra day for execution. The banks in European countries really did need that extra day.

50. Mr. HUANG Yangxin (China) proposed that, in article 10(1), the words "on the day it is received" should be replaced by the words "on the day it is accepted".

51. The CHAIRMAN recalled the Commission's view that acceptance of a payment order was implicit in article 10(1). The Drafting Group should ensure that the final text brought that point out clearly.

52. Mr. DE BOER (Netherlands) said he supported the principle of "same-day" execution and failed to see why the rule governing cut-off time was not considered relevant thereto. He understood that banks in some countries tended to set the cut-off time very early in the day, sometimes even before opening time. That practice gave them in effect an extra day for execution.

53. Mr. SOLIMAN (Egypt) said that, when discussing the time for the execution of payment orders, the Commission should take into account the technical possibilities available to the various States. He supported the proposal that an extra day be provided for the execution of payment orders and thought that the appropriate amendment should be made to article 10(1) and not to article 6.

54. Mr. VASSEUR (Banking Federation of the European Community) reiterated his Federation's written comment (A/CN.9/347, p. 68) that the rule requiring a receiving bank to execute a payment order on the day it was received was too strict. Under the terms of the European Community recommendation of 14 February 1990, a beneficiary's bank had to execute a payment order on the day following receipt of the related funds, unless a later date was stipulated.

55. Problems might arise if there were different rules for transfers inside and outside the European Community. He therefore suggested a modification of article 10(1) to the effect that a receiving bank was required to execute a payment order not later than on the day after it was received. The time required for acceptance had obviously to be taken into account.

56. Moreover, in the Federation's view, the text should make it clear that, in accordance with article 3, agreements contrary to article 10 would be expressly permitted.

57. The CHAIRMAN pointed out that it had already been decided that acceptance must have taken place before article 10(1) would apply.

58. Mr. LE GUEN (France) said he agreed with the arguments of the German representative. To stipulate that a receiving bank would be required to execute a payment order on the day it was received would cause no problems for banks operating electronic transfer systems. However, the Model Law was intended to apply to paper-based transfers also. It was unreasonable to impose a "same-day" rule on banks carrying out the latter type of operation.

59. It seemed to be rather hypocritical to set a cut-off time so early in the day that, for example, orders received shortly after 9 a.m. would be regarded as having been received on the following day. In countries governed by civil law, it was the general rule and not the exception that was important. If a

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judge had to apply the Model Law he would apply the general rule and, if the general rule were not appropriate for a large part of the transfers covered by the Model Law, there would be difficulties of application.

60. He therefore proposed that article 10(1) be amended to require the receiving bank to execute a payment order not later than on the day after it was received. That would not, of course, rule out execution on the day on which it was received.

61. He agreed with the observer for Austria that, if the time-limits in article 10(1) were extended by one day, all the problems arising under article 6(3) would also be solved.

62. The CHAIRMAN asked the representative of France whether he was opposing article 10(4) on the grounds that a bank could set an arbitrary cut-off time.

63. Mr. HERZBERG (Observer for Israel) said that it was common banking practice to set a cut-off time which marked the end of one business day and the beginning of the next. That was something that could not be ignored in the Model Law.

64. Mr. LE GUEN (France) said he was not opposed to article 10(4) as such. He simply did not think it desirable that the possibilities of article 10(4) be used to solve the general problem of the time of execution.

65. Mr. BHALA (United States of America) said that he agreed with the Netherlands representative that the answer was to set an appropriate cut-off time. He quite understood that different payment systems and different means of transmission were used and had not, in fact, stated that the "same-day" system should apply to paper-based transfers. There could be one cut-off time for the latter and one for electronic transfers. He was puzzled, however, at the use of the word "hypocritical" by one speaker, since he had thought there was a basic understanding regarding freedom of contract.

66. Mr. CONOBOY (United Kingdom) said he agreed with the representatives of the United States and the Netherlands concerning the relevance of the cut-off time in overcoming difficulties experienced with some payment systems in some countries. He did not believe that, as a general rule, a bank should be given an extra day to execute a payment order when it had already accepted that order and had received payment. That would build a "float" into the banking system.

67. The representative of Germany and the observer for the Banking Federation of the European Community had referred to the transparency recommendation of the European Community. That recommendation had no binding legal force. If UNCITRAL were to adopt a different rule, it was not impossible that the European Community might accept the UNCITRAL standpoint and introduce a "same-day" rule. He noted, in that connection, the comment by the Commission

(Mr. Conoboy, United Kingdom)

of the European Communities (A/CN.9/347, p. 70) that endeavours to induce banks to execute payment orders on the day they were received were, therefore, in principle to be welcomed.

68. Replying to the representative of Germany, he said that, if there were a rule stating that the receiving bank might execute a payment order on the day after it was received, it would be necessary to consider how that would affect other provisions of the Model Law, such as conditions regarding the completion of payment, discharge, etc. He supported the adoption of article 10(1) as it stood.

69. Mr. HERZBERG (Observer for Israel) said he agreed with the remarks made by the representatives of the Netherlands, the United States and the United Kingdom. Most banks had a cut-off time which reflected the possibility of executing a payment order on the business day on which it was accepted.

70. Mr. KAKOLECKI (Observer for Poland) said that it would be difficult for his Government to accept and apply such a rigid provision. He therefore supported the position of the French delegation and the Banking Federation of the European Community.

71. Mr. POTYKA (Observer for Austria) said he agreed with the views expressed by the representatives of Germany and France and with the written comments by the Government of Switzerland and the Commission of the European Communities (A/CN.9/347). He pointed out that, though the Commission of the European Communities had indicated that it would welcome endeavours to induce banks to execute payment orders on the day they were received, the subsequent paragraph had suggested that a possible compromise might take the form of stipulating that the execution of a payment order must take place no later than the following day. He also supported the French representative's view on cut-off times.

72. Mr. ERIKSSON (Observer for Sweden) said he supported the "same-day" system. It was crucial that banks be given the time they needed to decide whether to accept or reject a payment order but, if that were done, banks would not need extra time. Article 10(1) should therefore be adopted as it stood, and changes should be made only to article 6.

73. Mr. IWAHARA (Japan) said he, too, supported the "same-day" system.

74. Mr. LOJENDIO OSBORNE (Spain) said that article 10(1) should be amended to require payment orders to be executed on the day following that on which they were received. It would also be necessary to provide for the possibility of executing a payment order at an earlier date, so as to facilitate the broadest general acceptance of the Model Law.

75. Mr. BISCHOFF (Observer for Switzerland) said that, while a bank had every interest in executing payment orders on the day they were received, additional time might be needed, for instance, if the bank received a conditional order and had to consult its legal department on the subject. Moreover, under the

(Mr. Bischoff, Observer for Switzerland)

law in force in his country and others, banks were required to trace the path followed by money if there was a suspicion of laundering. That took time, so that the requirement of an extra day was quite justified.

76. Mr. LIM (Singapore) said that it was essential that traders should be able to rely on the instant execution of payments. He therefore supported the "same-day" rule. There was no need for an extra day under either article 6 or 10; if problems arose, the setting of an earlier cut-off time would provide the needed flexibility.

77. If, however, the Commission wished to provide for an extra day, article 10(1)(a) should be amended so as to allow for an earlier as well as for a later date. Alternatively, the concerns of some delegations might be met by applying to article 10 the possibility of variation by agreement under article 3.

78. Mr. ABASCAL ZAMORA (Mexico) said that serious problems could be created in an international credit transfer involving six or seven banks if the process were slowed down by an extra day at each stage.

79. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, since an extra day was being granted under article 6, it was unnecessary to grant a further day under article 10. He was thus in favour of adopting article 10(1) as it stood.

80. Mr. SKELEMANI (Observer for Botswana) said that an extra day was sometimes needed to cover situations in which a bank, for good reason, could not execute an order on the day on which it was received.

The meeting rose at 12.40 p.m.